

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**A.N., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, Sepulveda, CA, Employer**

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**Docket No. 10-247  
Issued: August 19, 2010**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 2, 2009 appellant filed a timely appeal from an October 21, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has established an emotional condition causally related to compensable work factors.

**FACTUAL HISTORY**

On August 29, 2008 appellant, then a 44-year-old telephone operator, filed an occupational disease claim (Form CA-2) alleging that he sustained an emotional condition as a result of his federal employment. On the claim form he alleged that he was subject to discrimination on the basis of sexual orientation, race and mental illness.

In a narrative statement dated October 3, 2009, appellant alleged he was subject to discrimination by a supervisor, Jessie Young, and a coworker, Walter Tillman. In July 2008 appellant had been assigned to a requested location near his home in Sepulveda, but was then reassigned by Mr. Young back to his original facility in September 2008. According to appellant, he was falsely accused of excessive absenteeism by Mr. Tillman, as well as being subject to derogatory comments regarding his sexual orientation. In a September 22, 2008 letter, he contended that he received average scores on his performance evaluation, further evidence of discrimination.

The record contains a “report of contact” dated August 12, 2008. Appellant alleged that Mr. Tillman had used the term “faggot” in his presence and made statements like “If I ever end up in prison, I would kill any male who tried to touch me.” In a report of contact dated August 29, 2008, he stated that he went to Mr. Young’s office to secure a compensation form, and Mr. Young yelled at him to get out of the office. Appellant also submitted two statements from coworkers stating they had been subject to discrimination.

On January 9, 2009 Mr. Young stated that he had not been aware of appellant’s sexual orientation and he never heard Mr. Tillman use the term “faggot.” He reported that appellant’s attendance was in compliance with employing establishment regulations and he was reassigned from the Sepulveda facility due to a conflict with a coworker.<sup>1</sup>

Mr. Wright, another supervisor, provided a January 26, 2009 statement that Mr. Tillman had expressed concern at what he felt was excessive time used by appellant for lunch and breaks. In response, appellant had written that Mr. Tillman was away from the office excessively and used derogatory language, which Mr. Tillman denied. According to the supervisor, a coworker who worked with both employees stated that she had never heard Mr. Tillman use derogatory language toward appellant. During an interview with Mr. Tillman, he stated that he did not call appellant a “faggot,” but had used the word in appellant’s presence.

By decision dated February 6, 2009, the Office denied the claim for compensation. It found appellant had not established a compensable work factor.

Appellant requested a hearing before an Office hearing representative, which was held on July 24, 2009. At the hearing, he indicated an Equal Employment Opportunity (EEO) complaint had been filed, though no decision had been issued. Appellant alleged that his supervisor and the coworker tried to get him out of the Sepulveda facility, and their actions were racially motivated as they were African-American and he was Caucasian.

By decision dated October 21, 2009, the hearing representative affirmed the February 6, 2009 decision.

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<sup>1</sup> The record contains an August 27, 2008 report of contact indicating appellant was being reassigned on September 3, 2008 due to a conflict with a coworker that was having an adverse effect on service.

### **LEGAL PRECEDENT**

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by factors of his federal employment.<sup>2</sup> This burden includes the submission of detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.<sup>3</sup> A claimant must also submit rationalized medical opinion evidence establishing a causal relationship between the claimed condition and the established, compensable work factors.<sup>4</sup>

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.<sup>5</sup>

A reaction to an administrative or personnel matter is generally not covered as it is not related to the performance of regular or specially assigned duties.<sup>6</sup> Nevertheless, if the evidence demonstrates that the employing establishment erred, acted abusively or unreasonably in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse may be covered.<sup>7</sup>

For discrimination to give rise to a compensable disability, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such action occurred. A claimant must establish a factual basis for his or her allegations that discrimination occurred with probative and reliable evidence.<sup>8</sup> With regard to emotional claims arising under the Act, the term discrimination or harassment as applied by the Board is not the equivalent of that as defined or implemented by other agencies, such as the EEO

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<sup>2</sup> *Pamela R. Rice*, 38 ECAB 838 (1987).

<sup>3</sup> *Roger Williams*, 52 ECAB 468 (2001); *Anna C. Leanza*, 48 ECAB 115 (1996).

<sup>4</sup> *See Bonnie Goodman*, 50 ECAB 139, 141 (1998).

<sup>5</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>6</sup> *See Brian H. Derrick*, 51 ECAB 417, 421 (2000).

<sup>7</sup> *Margreate Lublin*, 44 ECAB 945, 956 (1993).

<sup>8</sup> *James E. Norris*, 52 ECAB 93 (2000).

Commission which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers' compensation under the Act, the term harassment is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by co-employees or workers. Mere perceptions and feelings of discrimination or harassment will not support an award of compensation.<sup>9</sup>

### ANALYSIS

Appellant alleged discrimination by a supervisor and coworker as contributing to his emotional condition. The initial question is whether he has substantiated a compensable work factor. Once a compensable work factor is established, then the medical evidence is considered to determine if causal relationship is established between a diagnosed condition and the compensable work factor.

A claim based on discrimination must be supported by reliable and probative evidence. In this case, appellant has not supported his claim with sufficient evidence to suggest his allegations as factual. He has made a general allegation that he was subject to discrimination based on sexual orientation, race and a medical condition, without providing probative evidence of discrimination. The statements of appellant's coworkers do not discuss specific actions of any supervisor or coworker towards appellant. Mr. Young stated that he was unaware of appellant's sexual orientation. As to race, appellant indicated that a supervisor and coworker were African-American and he alleged they tried to get him removed from the Sepulveda facility. He did not provide sufficient probative evidence to support his allegations of discrimination. Appellant's perception that actions were based on race is not a compensable factor. With respect to a medical condition, he did not provide reliable evidence of any discrimination based on a medical condition.

Appellant has not provided details regarding specific instances of alleged discrimination. He indicated that he wanted to stay at the Sepulveda facility but was moved after two months. The reassignment is an administrative action of the employing establishment, and would be a compensable factor only if the evidence established error or abuse.<sup>10</sup> The supervisor explained that appellant was reassigned due to a conflict with a coworker that was affecting the quality of service provided. Without specific witness statements supporting appellant's specific allegations, no evidence of error or abuse is presented. Appellant also alleged he was subject to verbal abuse by the coworker, but the allegations do not rise to the level of verbal abuse. While the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to a compensable work factor.<sup>11</sup> The statements attributed to the coworker are not sufficiently corroborated to establish verbal abuse. The evidence indicated that a derogatory term was used in appellant's presence, and was not directed at appellant, and without contrary evidence, it cannot establish this factor.

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<sup>9</sup> *G.S.*, 61 ECAB \_\_\_\_ (Docket No. 09-764, issued December 18, 2009).

<sup>10</sup> Similarly, a performance evaluation is an administrative matter and would be compensable only if error or abuse is established by the evidence of record.

<sup>11</sup> *Judy L. Kahn*, 53 ECAB 321, 326 (2002).

The evidence of record does not substantiate a compensable work factor. Since appellant has not established a compensable work factor, the Board will not address the medical evidence.<sup>12</sup>

### **CONCLUSION**

The Board finds that appellant did not establish an emotional condition causally related to compensable work factors.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 21, 2009 is affirmed.

Issued: August 19, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>12</sup> See *Margaret S. Krzycki*, 43 ECAB 496 (1992).